



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FTI/170791

PRELIMINARY RECITALS

Pursuant to a petition filed December 11, 2015, under Wis. Stat. § 49.85(4), and Wis. Admin. Code §§ HA 3.03(1), (3), to review a decision by the Public Assistance Collection Unit (PACU) in regard to FoodShare benefits (FS), a hearing was held on January 7, 2016, by telephone.

The issue for determination are (1) whether petitioner's appeal was timely, (2) whether the Department correctly sought to intercept the petitioner's state income tax refund to collect an overpayment of FoodShare benefits, and (3) whether the amount of the trafficking-related overpayment was correctly determined.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

I

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED], Card Trafficking Agent
Public Assistance Collection Unit
P.O. Box 8938
Madison, WI 53708-8938

ADMINISTRATIVE LAW JUDGE:

Nancy J. Gagnon
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Minnesota, but formerly resided in Brown County, Wisconsin in 2011 and 2012. When the petitioner left Brown County, she moved to [REDACTED]

██████████, St. Paul, Minnesota. In March 2015, she moved to ██████████
██████████, Plymouth, Minnesota ██████████, per CCAP.

2. On **April 15, 2015**, the Department mailed two *Notifications of FS Overissuance* and worksheets to the petitioner at her last known (to the Department) mailing address of ██████████
██████████, St. Paul, MN ██████████. The *Notifications* advised of overpayments totaling \$4,617.87, and told the petitioner to file any appeal of the overpayment within 90 days. *See*, Exhibit 2. She did not appeal.
3. The Department mailed written notice of a negative action to the petitioner's former address of ██████████
██████████, St. Paul, MN ██████████ on **September 11, 2015**. The negative action was notification of state income tax refund interception. Specifically, the interception notice states that an unpaid FS debt of \$4,617.87 remained for possible interception. The notice also advised the petitioner to file an appeal of the interception certification within 30 days of the September 11, 2015, notice. However, the petitioner was not living at that address in September 2015, so a delay in receipt occurred due to the mail being forwarded.
4. The petitioner filed a hearing request with the Department on December 11, 2015.
5. To date, the Department has not collected any portion of the overpayment from the petitioner, thereby leaving a current balance of \$4,617.87 remaining for collection. The petitioner made no assertion that she has made payment against this balance due.
6. The petitioner pled "no contest" through her attorney to a welfare fraud ordinance violation (§30.05(7)) in Brown County on June 10, 2015. The petitioner trafficked FS benefits totaling \$4,540.79.

DISCUSSION

The Department is required to recover all overpayments of public assistance benefits: "...The State agency shall establish a claim against any household that has received more food stamp benefits than it is entitled to receive....," Wis. Stat. § 49.125(1); see also 7 C.F.R. § 273.18(a) .

The Department may utilize tax refund interception as a means of recovering the overpayment. Wis. Stat. § 49.85. Section 49.85 provides that the Department shall, at least annually, certify to the Department of Revenue the amounts that it has determined that it may recover resulting from overissuance of Food Share benefits.

The Department must notify the person that it intends to certify the overpayment to the Department of Revenue for setoff from his/her state income tax refund and must inform the person that he/she may appeal the decision by requesting a hearing. *Id.* at § 49.85(3). The Department has issued the required refund interception notice here.

I. JURISDICTION TO REVIEW THE MERITS OF THE UNDERLYING OVERPAYMENT DETERMINATION.

The hearing right is described in Wis. Stat. § 49.85(4)(b), as follows:

If a person has requested a hearing under this subsection, the department ... shall hold a contested case hearing under s. 227.44, except that the department of health services may limit the scope of the hearing to exclude issues *that were presented at a prior hearing or that could have been presented at a prior opportunity for hearing.*

(emphasis added)

The petitioner has *not* had a prior opportunity for hearing on the merits of the overpayment. She did not file a hearing request to challenge that overpayment within the 90 day appeal period. However, she argues that failure to so file is understandable, because she did not receive notification of the FS overpayment. Whether she eventually got the overpayment notices or not, an incorrect mailing address was used, and it is plausible that the notices did not reach the petitioner in time for a timely appeal. Thus, the Department's "untimely appeal" argument fails, and the petitioner must be given an opportunity to argue the validity of the overpayment decision here.

II. THE PETITIONER HAS SOME LIABILITY FOR THE 5/2011 – 7/2012 FS OVERPAYMENT, DUE TO TRAFFICKING.

The Department asserts that the petitioner trafficked her FS benefits at [REDACTED], a convenience store in Green Bay, Wisconsin, from May 11, 2011 through July 31, 2012. The amount of all trafficked benefits are recoverable in the same manner as other overpayments:

Sec. 273.18 Claims against households.

(a) *General.* (1) A recipient claim is an amount owed because of:

(i) Benefits that are overpaid or...

...

(4) The following are responsible for paying a claim:

(i) *Each person who was an adult member of the household when the overpayment or trafficking occurred;*

(ii) A sponsor of an alien household member if the sponsor is at fault; or

(iii) A person connected to the household, such as an authorized representative, who actually trafficks or otherwise causes an overpayment or trafficking.

(emphasis added)

7 C.F.R. §273.18(a)(1),(4).

See also *FS Wisconsin Handbook (FSWH)* at §§7.3.2.4, related to trafficking, <http://www.emhandbooks.wisconsin.gov/fsh/fsh.htm>, and 7 C.F.R. § 271.2.

At hearing, the Department presented evidence of the petitioner's trafficking activity with [REDACTED] in 2011 and 2012. *See*, Exhibit 3. Per investigations by the Department and the Brown County Sheriff's Department, [REDACTED] was a small, minimally stocked convenience store. It had limited counter space, limited staple food stock, and only one cash register. The latter made it almost impossible to ring up large amounts of groceries in a few minutes. Much of the food was observed to be expired. The store kept a stack of ledgers going back to 2011, in which the owner kept track of tabs; it is suspected that cash and non-food items were exchanged for debits against FoodShare cards. Although not especially prevalent in this case, other recipients had many FoodShare card transactions at [REDACTED] that ended in the same cent value, which is suspicious. A detective who visited the store noted that it did not have enough stock/merchandise to support the high volume of sales claimed through Foodshare transactions.

I accept the Department's assertion that [REDACTED] was engaging in FS trafficking with many of its customers. The question for this overpayment case is, whether the Department has shown by a preponderance of the credible evidence, that the petitioner was engaged in FS trafficking with this shady operation. The Department has established that the petitioner's name and telephone number appear repeatedly in the [REDACTED] owner's ledger of "tabs." Second, she performed a series of "high dollar" (*e.g.*, suspicious, given the small, under-stocked store) FS card transactions:

June 2011: \$272.96, \$110.89, \$110.00
 July 2011: \$158.24, \$110.59
 September 2011: \$209.93, \$110.00
 October 2011: \$129.98
 November 2011: \$215.57, \$139.97
 December 2011: \$279.30
 January 2012: \$296.52
 February 2012: \$344.10
 March 2012: \$267.99 (at companion store, [REDACTED], next door), \$247.04
 April 2012: \$348.97, \$112.92 at [REDACTED]
 May 2012: \$418.93
 June 2012: \$352.46 & \$122.99 at [REDACTED]
 July 2012: \$104.02

It is not believable that the petitioner bought groceries for these amounts of money from [REDACTED]. The petitioner's husband testified at hearing that he does not believe that his wife engaged in trafficking with [REDACTED]. However, he was living in another state at the time, so he was not in a position to observe what his wife was doing with her FS card. Finally, the petitioner testified that she pled no contest to the county welfare fraud ordinance violation, filed in connection the [REDACTED] "purchases," on the advice of her attorney. She asserts that the attorney told her that the only ramification of the no contest plea would be that she would have to pay a fine; nothing was mentioned about FS overpayment recovery. The Department is not bound by representations made or advice given by private attorneys to their clients. I conclude by a preponderance of the credible evidence that the petitioner did engage in some degree of trafficking with [REDACTED], so there is an overpayment here.

In calculating the overpayment amount, the Department tallied all [REDACTED] transactions made by the petitioner from May 27, 2011 through July 10, 2012. The total is \$4,617.87. The petitioner offered no documentation to establish that any of these transactions were food purchases. However, the petitioner does not have the burden here. The federal FS overpayment rule gives this minimal instruction on deciding upon the amount of the trafficking claim:

(2) *Trafficking-related claims.* Claims arising from trafficking-related offenses will be the value of the trafficked benefits as determined by:

- (i) The individual's admission;
- (ii) Adjudication; or
- (iii) The documentation that forms the basis for the trafficking determination.

7 C.F.R. § 273.18(c)(2). The test is the value of trafficked benefits, not the value of all issued or used benefits. The petitioner has not admitted to any amount of trafficking, so (i) above is not helpful. The Brown County court proceedings did not contain a Finding as to the amount of the petitioner's trafficking, so (ii) is not helpful. I must rely upon the Department's documentation. That documentation is p. 10 of Exhibit 3, the EBT transactions sheet. The transactions listed total \$4,617.87. However, six transactions are under \$20. Keeping in mind that the Department has the burden of proof, I do not consider a small number of transactions under \$20 to be proved trafficking transactions. Thus, I will direct the Department to reduce the overpayment amount by the total of the six low-dollar transactions: \$6.17 on July 7, 2011, \$10.64 on July 9, 2011, \$12.99 on October 10, 2011, \$14.29 on October 19, 2011, \$16.00 on December 16, 2011, \$16.99 on January 22, 2012, for a total of **\$77.08**.

CONCLUSIONS OF LAW

1. Jurisdiction is present to consider the merits of the underlying overpayment determination against the petitioner, as she did not timely receive a *Notification of FS Overissuance* or the tax interception notice for the relevant claims.
2. The petitioner engaged in FS trafficking with the [REDACTED] Market in 2011 and 2012; thus, she is subject to recovery of trafficked benefits.
3. The petitioner trafficked FS benefits totaling \$4,540.79 (\$4,617.87 - \$77.08).
4. Certification for tax refund interception against the petitioner for claims # [REDACTED] and/or # [REDACTED] must be modified to capture a reduction of \$77.08.

THEREFORE, it is

ORDERED

That the petition is *remanded* to the Department/PACU with instructions to reduce the petitioner's overpayment liability for the May 2011 through July 2012 period by \$77.08. This action, which will leave a balance for collection and refund interception of \$4,540.79, shall be taken within 10 days of the date of this Decision. In all other respects, the petition is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be *received within 20 days after the date of this decision*. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 *and* to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

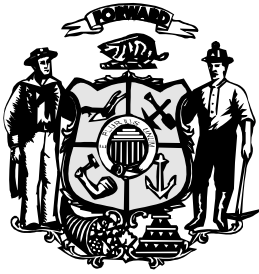
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, *and* on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 8th day of February, 2016

\sNancy J. Gagnon
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 8, 2016.

Public Assistance Collection Unit
Public Assistance Collection Unit